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DOES APPLICATION OF THE APA'S "COMMITTED TO AGENCY DISCRETION" EXCEPTION VIOLATE THE NONDELEGATION DOCTRINE?

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Abstract: An overly broad delegation implicates two conflicting doctrines: the nondelegation doctrine and the "committed to agency discretion" exception to judicial review. Under a traditional application of the nondelegation doctrine, courts strike down delegations that lack an intelligible principle as unconstitutional, reasoning that Article I implicitly prohibits Congress from giving away its legislative power. Such a ruling renders the agency powerless, because the agency has no authority to act under the failed delegation. Conversely, by prohibiting courts from reviewing agency actions in cases where there is "no law to apply," the "committed to agency discretion" exception affords an agency unfettered discretion when it acts under the authority of an overly broad delegation. As such, these two doctrines, which employ essentially the same test, dictate contradictory results. Moreover, if applied to administrative rulemaking, the "committed to agency discretion" exception would be unconstitutional because it would violate the nondelegation doctrine.

INTRODUCTION

The Supreme Court originally developed the nondelegation doctrine to ensure that Congress did not transfer its constitutionally vested legislative power.[1] Just as important, the nondelegation doctrine also served to check the delegatee's power by ensuring that Congress had cabined the delegatee's discretion by providing a guiding intelligible principle.[2] In the wake of the New Deal, however, the Court began to construe the doctrine much less strictly, upholding increasingly broader delegations by finding that relatively vague stan-

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[1] *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[2] *See J.W. Hampton*, 276 U.S. at 409.

dards fulfilled the intelligible principle requirement.[3] During the past thirty years, as the administrative state boomed, courts further softened enforcement of the nondelegation doctrine.[4] Although the D.C. Circuit recently resuscitated the "moribund"[5] doctrine when it held that air quality regulations promulgated by EPA under the Clean Air Act (CAA) lacked an intelligible principle,[6] the revival proved temporary when the Supreme Court unanimously reversed that holding in February of this year.[7] As such, the *American Trucking* decision makes clear that the Court's interpretation and application of the nondelegation doctrine remains consistent with that of the past several decades.[8] Specifically, the Court reiterated that only in rare and extreme instances does a delegation violate the nondelegation doctrine.[9]

In light of the recent interest surrounding the nondelegation doctrine, now is a particularly appropriate time to examine the contradiction embodied by the nondelegation doctrine and the "committed to agency discretion" exception to judicial review. Under section 701(a)(2) of the Administrative Procedure Act (APA),[10] judicial review of an agency action is precluded if the governing statute provides "no law to apply."[11] Although such a finding is rare,[12] in several cases the Supreme Court abstained from reviewing an agency action be-

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[3] *See* Yakus v. United States, 321 U.S. 414, 426 (1944).

[4] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989).

[5] *See* National Cable Television Ass'n, Inc. v. United States, 415 U.S. 352, 353 (1974).

[6] *See* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *opinion modified on reh'g*, American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd sub nom.* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903 (2001).

[7] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 912 (2001).

[8] *See id.*

[9] *See id.* at 913. The Court explained:

> [i]n the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."

Id. (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

[10] *See* 5 U.S.C. § 701(a)(2).

[11] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[12] *See id.*

cause it found that the action had in fact been "committed to agency discretion."[13]

On a most basic level, the nondelegation doctrine and the "committed to agency discretion" exception contradict each other. Under the nondelegation doctrine, an extremely broad delegation is deemed unconstitutional,[14] while under the "committed to agency discretion" exception, an agency enjoys virtually unlimited discretion when acting under the authority of such a delegation.[15] Given that the standards for the intelligible principle requirement and "no law to apply" test are virtually identical,[16] such inconsistent results are highly problematic.

I. THE NONDELEGATION DOCTRINE

A. *Delegation in the Early Years*

In its strictest and simplest form, the nondelegation doctrine asserts that any statute through which Congress[17] delegates its legislative[18] power is unconstitutional.[19] Both textual[20] and structural[21] arguments support this reading of the Constitution. Article I, section 1 states that, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[22] Structurally, the Constitution establishes the three branches of government. Each branch is required to fulfill its assigned duties, and by implication, forbidden from transferring its duties to one of the other branches.[23] Indeed, in 1989, the

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[13] *See* Dalton v. Specter, 511 U.S. 462, 477 (1994); Webster v. Doe, 486 U.S. 592, 601 (1988); Heckler v. Chaney, 470 U.S. 821, 838 (1985).

[14] *See J.W. Hampton*, 276 U.S. at 409.

[15] *See Overton Park*, 401 U.S. at 410.

[16] *See infra* Section III(A).

[17] This note discusses the nondelegation doctrine at the federal level. For a discussion of nondelegation at the state level, *see* 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW (1965); 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 2.07 etc. (1958); Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999). All three authors explain that the nondelegation doctrine is significantly stricter at the state level than it is at the federal level. *See* COOPER, *supra*, at 31; DAVIS, *supra*, at 101; Rossi, *supra*, at 1167.

[18] This note does not address Congressional delegation of adjudicatory power.

[19] *See* David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 735–36 (1999).

[20] *See* U.S. CONST. art. I, § 1.

[21] *See* Marci A. Hamilton, *Representation and Nondemocracy: Back to Basics*, 20 CARDOZO L. REV. 807, 807 (1999).

[22] U.S. CONST. art. I, § 1.

[23] *See* Hamilton, *supra* note 21, at 807.

Court explained that, "[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government."[24]

The nondelegation argument was made as early as 1813 in *The Brig Aurora v. United States*, in opposition to a congressional act that took effect upon the President's declaration that Great Britain or France had stopped interfering with U.S. trade.[25] The *Aurora* Court rejected the nondelegation argument, however, reasoning that Congress had not delegated its legislative authority to the President, but rather had "conditionally" exercised it.[26] Although Congress had technically delegated its rule-making power to the President in *Aurora*,[27] the Court probably upheld the delegation because it was extremely limited in scope: Congress had provided clear standards regarding who was granted authority,[28] what was subject to that authority,[29] and when the authority could be exercised.[30] In essence, Congress had significantly restricted the scope of the President's power such that he served more as the trigger for an already-enacted law than as the legislator of that law.[31]

During the next one hundred years, the Court continued to reject the nondelegation doctrine under the pretense that legislative power had not been delegated by Congress.[32] In fact, the Court loosened its *Aurora* standard by upholding statutes even in cases where Congress had not provided standards as clear and restrictive as those found in *Aurora*.[33] Notably, the Court upheld statutes that did not

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[24] *See* Mistretta v. United States, 488 U.S. 361, 371 (1989).

[25] *See* The Brig Aurora v. United States, 11 U.S. 382, 383 (1813). The act mandated that:

> the President of the United States ... is hereby authorized, in case either France or Great Britain shall so revoke or modify her edicts, as that they shall cease to violate the neutral commerce of the United States, to declare the same by proclamation; after which the trade suspended by this act ... may be renewed.

Id. at 383 (quoting § 11 of the Non-Intercourse Act of Mar. 1, 1809).

[26] *See id.* at 388.

[27] *See id.* at 383.

[28] *See id.* The act delegated power to the President. *See id.*

[29] *See id.*

[30] *See Brig Aurora*, 11 U.S. at 383.

[31] *See id.* at 388.

[32] *See* United States v. Grimaud, 220 U.S. 506, 517 (1911); Field v. Clark, 143 U.S. 649, 692 (1892).

[33] *See Grimaud*, 220 U.S. at 515; *Field*, 143 U.S. at 691–92.

make it obvious when the delegated authority could be exercised,[34] and it did so under the continued assertion that a delegation of legislative power in fact had not occurred.[35]

For example, in *Field v. Clark*, the Court upheld a delegation of authority that allowed the President to impose a retaliatory tax upon a determination that other nations had imposed "reciprocally unequal and unreasonable" taxes on American products sold abroad.[36] The Court characterized the nature of the President's determination as factual, and therefore not an exercise of legislative power.[37] However, the statutory standard of "unequal and unreasonable" is considerably more vague and subjective than had been provided by Congress in *Aurora*.[38]

Furthermore, in *United States v. Grimaud*, the Court upheld a statute that delegated authority to the Secretary of Agriculture to "make provision for the protection against destruction and depradations upon the public forests."[39] The Court held that the statute did not violate the nondelegation doctrine because Congress had not delegated the power to legislate, but merely the "power to fill up the details" of the act.[40] In this way, the Court gradually—and unofficially—permitted congressional delegations of legislative authority to broaden in scope.[41]

In a bold 1928 decision, *J.W. Hampton v. United States*, the Court admitted for the first time that it was upholding a statute—the Tariff Act of 1922—that did in fact delegate legislative power.[42] The Court reconciled its holding with the nondelegation doctrine by reasoning that the delegation of legislative power is constitutional "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [legislate] is directed to conform."[43] Under the Tariff Act, Congress had granted the President the power to adjust tariffs whenever it was necessary to "equalize the costs of production in the United States and the principal competing coun-

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[34] *See Grimaud*, 220 U.S. at 507; *Field*, 143 U.S. at 691–92.
[35] *See Grimaud*, 220 U.S. at 517; *Field*, 143 U.S. at 692.
[36] *See Field*, 143 U.S. at 691–92.
[37] *See id.*
[38] *Compare id. with Aurora*, 11 U.S. at 383.
[39] *See Grimaud*, 220 U.S. at 517.
[40] *See id.*
[41] *See id.*
[42] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 401, 409 (1928).
[43] *See id.*

try."[44] Thus, the Court concluded that the statutory standard "equalize the costs of production" constituted an "intelligible principle" that sufficiently restricted the President's power.[45]

Although the *Hampton* Court did not specify how detailed the intelligible principle must be, it was satisfied in that case with a general statement of purpose[46] and a requirement that the President consult experts and make findings.[47] Significantly, the Court's motivation to uphold the statute seems to have stemmed in part from the practical concern that certain problems—such as fluctuating tariffs—need swift and expert attention, a condition the traditional legislative process simply cannot accommodate.[48]

B. *Delegation in the New Deal Era*

During the New Deal era, Congress enacted a series of statutes aimed at rectifying the national economic crisis.[49] The Court responded by giving teeth to the nondelegation doctrine for the first time in its history.[50] Specifically, during the mid-1930s, the Court struck down three statutory provisions as unconstitutional delegations of congressional legislative authority.[51]

In *Panama Refining Co. v. Ryan*, the Court found that Congress had granted overly broad legislative power to the President by permitting him to ban interstate shipments of "hot oil"[52] under section 9(c) of the National Industrial Recovery Act (NIRA) without providing substantive or procedural standards to govern his decision.[53] Specifically, the Court held that section 9(c) was unconstitutional because "Congress has declared no policy, has established no standard, has laid down no rule" (i.e., has articulated no "intelligible princi-

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[44] *See id.* at 401.

[45] *See id.* at 409.

[46] *See id.*

[47] *See J.W. Hampton*, 276 U.S. at 409. The statute required the President to consult with a congressionally appointed Tariff Commission for advice prior to the exercise of his legislative power. *See id.* at 409.

[48] *See id.*

[49] *See* BREYER et al., ADMINISTRATIVE LAW AND REGULATORY POLICY 40 (1999).

[50] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 521 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935).

[51] *See Carter Coal*, 298 U.S. at 311; *Schechter Poultry*, 295 U.S. at 541–42; *Panama Refining*, 293 U.S. at 430.

[52] *See Panama Refining*, 293 U.S. at 436 (Cardozo, J., dissenting). "Hot oil" refers to "oil produced or transported in excess of a statutory quota." *Id.*

[53] *See id.* at 430.

ple"[54]) defining the conditions under which the President could exercise the delegated power.[55] Because the Court viewed the nondelegation doctrine as a constitutional check prohibiting Congress from giving away its Article I powers, its analysis was focused solely on the language and history of the statute.[56] In particular, the Court examined the language of section 9(c)[57] and other related provisions of NIRA.[58]

Significantly, the Court's nondelegation analysis did not include a discussion of the manner in which the President exercised the delegated authority.[59] The Court did not review the substance of the President's decision, or the process by which the decision was rendered.[60] Indeed, the Court rejected the argument that the delegation carried an implicit governing standard by virtue of the fact that the delegatee was the President, who "has acted, and will act, for what he believes to be the public good."[61] Explaining the rationale behind the nondelegation doctrine, the Court stated: "The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute. . . . The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[62] In other words, the President's actions could not save an otherwise unconstitutional delegation, because the non-

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[54] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[55] *See Panama Refining*, 293 U.S. at 430.

[56] *See id.* at 414–20. The Court explained that its nondelegation inquiry required an analysis of the statute "to see whether the Congress has declared a policy . . . set up a standard . . . [or] required any finding by the President in the exercise of the authority." *Id.* at 415.

[57] *See id.* at 415. The Court concluded that section 9(c) failed to provide substantive or procedural guidelines that would have served to limit the President's authority. *See id.* For instance, the Court noted that Congress did not require the President to make findings before prohibiting the interstate transport of "hot oil." *See id.*

[58] *See id.* at 416. The Court turned first to section 9 to examine the "context" of subsection (c), and determined that although subsections (a) and (b) did indeed provide limiting standards, those subsections were unrelated to the subject of section 9(c). *See id.* The Court looked next to other sections of NIRA, but concluded that the general policies articulated failed to determine the conditions under which the President could exercise the delegated power. *See id.* at 417. *But see id.* at 434–36 (Cardozo, J., dissenting) (arguing that policies articulated throughout NIRA established standards sufficiently clear so as to govern the President's decision making).

[59] *See id.* at 414–20.

[60] *See Panama Refining*, 293 U.S. at 414–20.

[61] *See id.* at 420.

[62] *Id.* at 420–21.

delegation question was determined by the perimeters of the delegation itself.[63]

The Court offered a similar analysis in *Schechter Poultry*, which considered the constitutionality of section 3 of NIRA, a provision authorizing the President to approve agency-promulgated "codes of fair competition."[64] The Court, concerned primarily with the vagueness of the phrase "unfair methods of competition,"[65] again looked only at the language of the statute for an intelligible principle that would have curtailed the President's discretion and limited the scope of his rule-making authority.[66] In particular, the Court emphasized the lack of procedural requirements, distinguishing *Schechter Poultry*, from cases in which vague statutory delegations were upheld because Congress had established procedural requirements that served as guiding principles.[67] Finding that Congress had provided no such guiding principle in *Schechter Poultry*,[68] the Court again struck down a statutory provision as a violation of the nondelegation doctrine without discussing the substance of the code, or the process by which it was promulgated.[69]

In *Carter Coal*, the third and final Supreme Court decision to find that Congress had delegated its legislative authority in terms too

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[63] *See id.*

[64] *See* A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495, 529–32 (1935).

[65] *See id.* at 530.

[66] *See id.* at 529–32. The Court explained:

> [w]e look to the statute to see whether Congress has overstepped these [constitutional] limitations—whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

Id. at 530.

[67] *See id.* at 533–34, 539–40 (citing Federal Radio Comm'n v. Nelson Bros. Bond & Mtg. Co., 289 U.S. 266 (1933); Federal Trade Comm'n v. Raladam Co., 283 U.S. 643 (1931); Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913)). In *Nelson Brothers*, the Court upheld a delegation to issue licenses "'as public convenience, interest or necessity requires'" because Congress had required the Commission to conduct hearings. *See id.* at 540 (quoting *Federal Radio Comm'n*, 289 U.S. at 285). In *Raladam*, the Court upheld a delegation to prevent "'unfair methods of competition'" because Congress had required extensive procedural safeguards, including notice, findings of fact, and hearings. *See id.* at 533–34 (quoting *Raladam*, 283 U.S. at 648–54). In *Louisville & Nashville Railroad Co.*, the Court upheld a delegation to regulate "'in the public interest'" because Congress had required evidence-based findings. *See id.* at 539–40 (quoting *Louisville & Nashville Railroad Co.*, 227 U.S. at 91–94).

[68] *See id.* at 542.

[69] *See Schechter Poultry*, 295 U.S. at 529–42.

broad, the Court provided very little reasoning on the specific issue of delegation.[70] In this case, there was neither analysis of the statutory language or legislative history, nor mention of the substance or process of the delegatee's rule-making.[71] Instead, the Court merely provided a cursory discussion of the delegation issue and treated the outcome as a foregone conclusion.[72] Thus, *Carter Coal* provided no meaningful contribution to the nondelegation analysis set forth in *Panama Refining* and *Schechter Poultry*.[73]

Taken together, however, the three cases establish a framework in which to assess the constitutionality of legislative delegation.[74] By restricting the scope of its inquiry to the language and history of the statute itself, the Court made it clear in the mid-1930s that the question of delegation turned on whether Congress had provided sufficient substantive guidance and procedural requirements to curtail the delegatee's discretion.[75] The delegation question was not determined by an analysis of the substance of the delegatee's rules, or by the actual process by which the rules were promulgated.[76]

After 1936, the Court returned to a broader interpretation of the nondelegation doctrine, actually construing the doctrine more loosely than it had in the past.[77] Most notably, in *Yakus v. United States*, the Court announced an exceedingly generous standard by which legislative delegations would henceforth be assessed.[78] The Court reasoned that:

> only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be *impossible* in a proper proceeding to ascertain whether the will of Congress had been obeyed, would we be justified in

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[70] *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

[71] *See id.* Because the plaintiffs challenged the delegation as soon as the legislation became effective, the delegated authority had not yet been exercised. *See id.*

[72] *See id.* Under the Bituminous Coal Conservation Act, Congress had delegated rate-setting power not to another governmental entity, but to private citizens who had a financial interest in the rates set. *See id.* The Court referred to this power as "legislative delegation in its most obnoxious form." *See id.*

[73] *See id.* at 310–11; *Schechter Poultry*, 295 U.S. at 542; Panama Refining Co. v. Ryan, 293 U.S. 388, 415 (1935).

[74] *See Carter Coal*, 298 U.S. 238, 311 (1936); *Schechter Poultry*, 295 U.S. at 542; *Panama Refining*, 293 U.S. at 415.

[75] *See Schechter Poultry*, 295 U.S. at 531–33; *Panama Refining*, 293 U.S. at 420–21.

[76] *See Schechter Poultry*, 295 U.S. at 531–33; *Panama Refining*, 293 U.S. at 420–21.

[77] *See* Yakus v. United States, 321 U.S. 414, 426 (1944).

[78] *See id.*

> overriding its choice of means for effecting its declared purpose.[79]

This, of course, is a much more lenient interpretation of the intelligible principle than the *Hampton* Court had proposed.[80] In *Yakus,* the Court upheld a provision of the Emergency Price Control Act that directed the Price Administrator to fix prices that "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."[81] The Court may have been more willing to accept such a vague standard in this case because it afforded Congress more flexibility in matters of war and foreign relations.[82]

C. *Delegation and the Administrative State*

The regulatory boom in the early 1970s[83] rekindled the nondelegation debate, both in the courts and in law journals.[84] The revived discussion has been markedly less focused on formalistic constitutional arguments, however, and more concerned with broader philosophical questions of accountability and other democratic principles within a representative government.[85] Judge Skelly Wright framed the issue in this way: "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy."[86] Others have echoed this sentiment, and none more adamantly than David Schoenbrod, who argues that delegation not only allows legislators to avoid making tough and unpopular decisions, but that such "buck passing" is in fact the legislature's primary reason for delegating its authority.[87] Nadine Strossen takes this argument one step further by suggesting

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[79] *Id.* (emphasis added).

[80] *Compare id. with* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[81] *See Yakus,* 321 U.S. at 427.

[82] *See id.* at 422–23 (explaining that statute in question was "a war emergency measure").

[83] Kevin B. Covington, *Federal Appellate Court Revives the Nondelegation Doctrine in Environmental Case,* 73-OCT FLA. B.J. 81, 81. Covington explains that, "[a] fundamental prerequisite for the growth of the federal government in the 20th century has been the ability of Congress to delegate broad powers and duties to agencies." *Id.*

[84] *See generally* Schoenbrod, *supra* note 19; Skelly Wright, *Review-Beyond Discretionary Justice,* 81 YALE L.J. 575 (1972).

[85] *See* Schoenbrod, *supra* note 19, at 732; Wright, *supra* note 84, at 582.

[86] *See* Wright, *supra* note 84, at 582.

[87] *See* Schoenbrod, *supra* note 19, at 734. Rejecting the idea that delegation leads to better rule making, Schoenbrod maintains that, "[f]rom its inception, the core purpose of delegation was to undercut democratic accountability." *Id.*

that delegation directly impinges upon the liberty of all American citizens by severely undermining our ability to oppose agency-promulgated regulations.[88]

In response to these democracy-based critiques of delegation, Dan Kahan attacks the notion of "democracy" as an evasive, empty—and ultimately useless—standard by which to assess the validity of delegation.[89] He suggests that the many competing notions of what constitutes a "democracy" are particularly malleable in the context of the delegation debate, and therefore should be removed from the discussion altogether.[90] In an even more direct (and irreverent) attack aimed at both the doctrine and the Court, Peter Schuck predicts that the nondelegation debate is in reality a hollow one, because the Court would never dare to revive the nondelegation doctrine in its traditional (i.e., extreme) form.[91] To take the nondelegation doctrine to its logical conclusion, he notes, the Court would be forced to dismantle the administrative state as we have come to know it.[92]

Chief Justice Rehnquist, however, appears both ready and willing to call that bluff.[93] In his concurring opinion in *Industrial Union Department v. American Petroleum Institute* (the Benzene case), Justice Rehnquist reacted against what he perceived to be the Court's permissiveness in upholding an overly broad delegation of legislative power.[94] Specifically, Justice Rehnquist called for the revival of the nondelegation doctrine in general,[95] and argued for its application in that case in particular.[96] The provision under fire in *Industrial Union*

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[88] *See* Nadine Strossen, *Delegation as a Danger to Liberty*, 20 CARDOZO L. REV. 861, 864–65 (1999). A few of the ways Strossen believes delegation threatens liberty are: the tendency for agencies to heed the interests of a narrow segment of society, the consolidation of legislative and adjudicatory roles within one agency, and the high level of deference afforded to agencies under judicial review. *See id.*

[89] *See* Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 795 (1999).

[90] *See id.* at 796. For example, Kahan explains that the "pluralist" concept of democracy values legislation that reflects the electorate's preferences, which conflicts with the "civic republican" view that values legislation that results from contemplation of the "common good." *See id.*

[91] *See* Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 775 (1999).

[92] *See id.*

[93] *See* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring). *But see* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 912–14 (2001) (joining in opinion upholding delegation to EPA to promulgate air quality regulations "requisite for human health").

[94] *See id.* at 672 (Rehnquist, J., concurring).

[95] *See id.* at 686–87 (Rehnquist, J., concurring).

[96] *See id.* at 675 (Rehnquist, J., concurring).

was section 6(b)(5) of the Occupational Safety and Health Act (OSHA), which directed the Secretary of Labor to "set the standard which most adequately assures [workplace safety] to the extent feasible."[97] Through an unusually aggressive construction of the phrase "to the extent feasible,"[98] the majority held that Congress had not violated the nondelegation doctrine; instead, it struck down the agency's safety standard for failing to fulfill the statutorily mandated procedural requirements.[99] Referring to the feasibility standard as a "legislative mirage" that Congress used to avoid resolving a politically charged issue, Justice Rehnquist would have struck down the delegation based on an analysis of the statutory language and history.[100]

Justice Rehnquist, joined by then-Chief Justice Burger, again advocated for strict application of the nondelegation doctrine in his *American Textile Manufacturers v. Donovan* (the Cotton Dust case) dissent.[101] In the Cotton Dust case, the majority again held that the phrase "to the extent feasible" provided sufficient statutory guidance.[102] The Court found that the Secretary of Labor simply had not followed the statute's procedural requirements.[103] Consistent with *Industrial Union*, the Court's reasoning in this case confirmed that the Court answered the delegation question by looking to the language and legislative history of the statute.[104] On that basic point, all nine justices impliedly agreed.[105]

Despite the urging of nondelegation supporters to the contrary, the Court has given no indication that it will return to a stricter view of the doctrine.[106] Instead, the Court has continued to uphold broad grants of legislative authority,[107] sometimes even avoiding the delegation issue altogether by reading statutes narrowly.[108]

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[97] *See id.* at 613.

[98] *See Industrial Union*, 448 U.S. at 642–45.

[99] *See id.* at 662.

[100] *See id.* at 673 (Rehnquist, J., concurring).

[101] *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 544–48 (1981) (Rehnquist, J., dissenting).

[102] *See id.* at 543 (Rehnquist, J., dissenting).

[103] *See id.* at 548.

[104] *See id.*

[105] *See generally id.*

[106] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 912–14 (2001); Loving v. United States, 517 U.S. 748, 758 (1996); Mistretta v. United States, 488 U.S. 361, 372 (1989).

[107] *See American Trucking*, 121 S.Ct. at 912–14; *Loving*, 517 U.S. at 771; *Mistretta*, 488 U.S. at 374.

[108] *See* National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974).

In *National Cable Television Ass'n, Inc. v. United States*, the Court considered whether a provision of the Independent Office Appropriation Act[109] violated the nondelegation doctrine by permitting the Federal Communications Commission (FCC) to levy a tax.[110] Directly acknowledging its desire to avoid the nondelegation issue,[111] the Court stated that: "the hurdles revealed in [*Schechter Poultry* and *Hampton*] lead us to read the Act narrowly to avoid constitutional problems."[112] Through such reasoning, the Court rejected the petitioner's argument that Congress had authorized the FCC to levy a tax.[113] Rather, the Court read the provision "narrowly as authorizing not a 'tax' but a 'fee,'" and thus delegation of legislative power was not implicated.[114]

In *Mistretta v. United States*, the Court did not side-step the delegation issue, but simply admitted that it was upholding a broad delegation of authority.[115] Through the Sentencing Reform Act, Congress empowered the United States Sentencing Commission to promulgate Federal Sentencing Guidelines.[116] The Court explained that the delegation was constitutional because Congress had provided substantive "goals"[117] and "purposes"[118] to guide the Commission. The Court also

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[109] *See id.* at 337. The provision at issue states that, "the head of each Federal agency is authorized by regulation . . . to prescribe therefor . . . such fee, charge, or price, if any, as he shall determine . . . to be fair and equitable." *Id.* (quoting 31 U.S.C. § 483(a)).

[110] *See generally id.* The Court explained that, "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes." *Id.* at 340.

[111] *See id.* at 342.

[112] *Id.*

[113] *See National Cable Television*, 415 U.S. at 341.

[114] *See id.*

[115] *See Mistretta*, 488 U.S. at 372.

[116] *See id.* at 367.

[117] *See id.* at 374. The Court explained:

> Congress charged the Commission with three goals: to "assure the meeting of the purposes of sentencing as set forth" in the Act; to "provide certainty and fairness in meeting the purposes of sentencing, avoid unwarranted sentencing disparities among defendants with similar records . . . while maintaining sufficient flexibility to permit individualized sentences," where appropriate; and to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."

Id. (quoting 28 U.S.C. § 991(b)(1)).

[118] *See id.* The Court explained:

> Congress further specified four "purposes" of sentencing that the Commission must pursue in carrying out its mandate: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to

noted that the legislative history further guided the Commission's rulemaking.[119] Relative to other delegations, the statutory standard at issue in *Mistretta* was not vague. In fact, it was considerably more detailed than those upheld in previous cases, such as *American Textile.*[120]

As such, the most striking aspect of the *Mistretta* opinion was not its holding, but a dramatic statement in which the majority acknowledged that its approach to the delegation question had been shaped largely by the growing need for administrative assistance in carrying out the business of Congress.[121] Specifically, the Court explained that its nondelegation jurisprudence "has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad directives."[122] Thus, the Court implicitly reasoned that a fundamental constitutional doctrine once meant to protect the basic framework of the government[123] had given way to more practical concerns.[124] In light of the Court's increasingly explicit refusals to strike down delegations as unconstitutional, it is with good reason that some commentators consider the nondelegation doctrine to be dead.[125]

D. Delegation and Whitman v. American Trucking Associations, Inc.

It was thus of great surprise[126] when in May 1999 the D.C. Circuit announced the return of the nondelegation doctrine in *American*

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protect the public from further crimes of the defendant"; and "to provide the defendant with needed . . . correctional treatment."

Id. (quoting 18 U.S.C. § 3553(a)(2)).

[119] *See Mistretta*, 488 U.S. at 376 n.10.

[120] *Compare id.* at 374–75, *with* American Textile Mfg., Inc. v. Donovan, 452 U.S. 490, 508 (1981).

[121] *See Mistretta*, 488 U.S. at 372.

[122] *Id.*

[123] *See id.* at 371. The Court explained that, "[t]he nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Id.*

[124] *See id.* at 372.

[125] *See* National Cable Television Ass'n, Inc., 415 U.S. 352, 353 (1974) (calling nondelegation doctrine "moribund"); Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 345 (1987); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1226 (1986).

[126] *See* Cass Sunstein, *The Court's Perilous Right Turn*, NY TIMES, June 2, 1999 (calling the *American Trucking* decision a "remarkable departure from precedent"); *Air Quality Standards: Court's Decision on Ozone, PM Rules Called "Extreme, Illogical" by Browner*, 30 ENV'T REP. 158 (May 28, 1999) (reporting that EPA Administrator Carol Browner called the decision "extreme, illogical and bizarre").

Trucking.[127] The court used the long-dormant doctrine to strike down final rules revising primary and secondary National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone.[128] Like most legislative delegations,[129] the Clean Air Act provided EPA with a fairly vague standard by which to promulgate public health regulations.[130] The majority agreed with the plaintiff that "EPA had construed sections 108 & 109 of the Clean Air Act so loosely as to render them unconstitutional delegations of legislative power."[131] More specifically, the court held that EPA had failed to articulate an intelligible principle by which the PM and ozone standards were determined, rendering the congressional delegation of legislative authority too broad.[132] The case was then remanded back to EPA to create an intelligible principle to guide its rulemaking.[133]

Critics of the *American Trucking* decision asserted, however, that the court's reasoning was flawed for several reasons.[134] First, they argued that by invoking the nondelegation doctrine, the majority relied on case law from the 1930's, thereby ignoring more than sixty years of common law precedent in which the Supreme Court has consistently rejected nondelegation arguments and upheld extremely broad delegations of legislative power.[135] In his dissenting opinion, Judge Tatel explained that if the court had applied the nondelegation doctrine as it had been applied in more recent cases, it would have found that

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[127] *See* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *opinion modified on reh'g*, American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd sub nom.* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903 (2001).

[128] *See id.* For a brief discussion of the NAAQS, see Craig N. Oren, *Run Over by* American Trucking *Part I: Can EPA Revive Its Air Quality Standards?*, 29 ELR 10653, 10654–55, 10660–62 (1999).

[129] *See id.* at 1057 (Tatel, J., dissenting).

[130] *See id.* at 1034. The CAA directs EPA to set standards at the level "requisite to protect the public health" with an "adequate margin of safety." *See id.* (quoting § 109(b)(1) of the CAA).

[131] *Id.*

[132] *See American Trucking*, 175 F.3d at 1034. The court explained that, "EPA appears to have articulated no 'intelligible principle' to channel its application of these [public health] factors; nor is one apparent from the statute." *Id.*

[133] *See id.* at 1038, 1057.

[134] *See generally id.* (Tatel, J., dissenting); Oren, *supra* note 128; Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999); *Recent Cases*, 113 HARV. L. REV. 1051 (2000).

[135] *See American Trucking*, 175 F.3d at 1038, 1057 (Tatel, J., dissenting); Oren, *supra* note 128, at 10656; Sunstein, *supra* note 134, at 310.

section 109 does in fact pass constitutional muster.[136] He reasoned that:

> section 109's delegation of authority is narrower and more principled than delegations the Supreme Court and this court have upheld since Schechter Poultry, and . . . the record in this case demonstrates that EPA's discretion was in fact cabined by section 109.[137]

Several scholars supported Judge Tatel's conclusion that the standard in question in *American Trucking* was no more vague than other statutory provisions that have survived nondelegation attacks.[138]

Moreover, some critics noted that by requiring EPA to develop an intelligible principle to guide its interpretation of the CAA,[139] the court distorted the *Hampton* rule, which states that Congress, not the agency, must articulate an intelligible principle when delegating legislative power.[140] Thus, as applied in *American Trucking*, the nondelegation doctrine no longer serves to prevent Congress from delegating its legislative power,[141] nor does it provide a check on agency discretion.[142] Even one of the plaintiff's attorneys acknowledges that the *American Trucking* decision "establishes a new approach to the constitutional non-delegation doctrine,"[143] though he characterizes the development as less than "radical."[144]

Finally, critics of the decision proposed that the case should have been decided not under the nondelegation doctrine, but instead under the APA's arbitrary and capricious standard of judicial review.[145]

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[136] *See American Trucking*, 175 F.3d at 1057 (Tatel, J., dissenting).

[137] *Id.*

[138] *See* Oren, *supra* note 128, at 10655–56 (stating that "this case does not seem a particularly outstanding example of a vague delegation"); *Recent Cases*, *supra* note 134, at 1054 (stating that "[t]he language of the CAA is considerably narrower than that accepted by the Supreme Court").

[139] *See American Trucking*, 175 F.3d at 1038.

[140] *See* Sunstein, *supra* note 134, at 310, 348–49; *Recent Cases*, *supra* note 134, at 1053–54.

[141] *See Recent Cases*, *supra* note 134, at 1054. The author states that, "if the doctrine is meant to limit Congress's ability to delegate its legislative authority, it is difficult to see how the recipient of the delegation, rather than Congress itself, can remedy the problem." *Id.*

[142] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[143] Gary Marchant, The *American Trucking Associations* Decision: Over-Turning the National Ambient Air Quality Standards for Ozone and Particulate Matter (visited Feb. 17, 2000) <http://merlin.law.mercer.edu/elaw/gmarchant.htm#trans>.

[144] *See id.*

[145] *See American Trucking*, 175 F.3d at 1059 (Tatel, J., dissenting); Oren, *supra* note 128, at 10658; *Recent Cases*, *supra* note 134, at 1055.

Indeed, the court's own analysis supports this proposition.[146] The majority focused its analysis of the nondelegation issue on an in-depth substantive and procedural review of the NAAQS,[147] even going so far as to call EPA's standard-setting "arbitrary and capricious."[148] Such attention to the substance of the PM and ozone regulations rather than the language of the CAA led Judge Tatel to conclude in his dissent:

> [w]hether EPA arbitrarily selected the studies it relied upon or drew mistaken conclusions from those studies (as petitioners argue), or whether EPA failed to live up to the principles it established for itself (as my colleagues believe . . .), has nothing to do with our inquiry under the nondelegation doctrine. Those issues related to whether the NAAQS are arbitrary and capricious.[149]

Judge Tatel further argued that EPA provided sufficient reasoning to defend its standard setting such that regulations should have withstood traditional arbitrary and capricious review.[150]

In a per curiam decision partially denying EPA's petition for rehearing, the D.C. Circuit held en banc that the nondelegation holding was valid.[151] The court also responded to criticisms by further explaining the rationale behind its new approach to the nondelegation doctrine.[152] The court reasoned that its new approach to nondelegation was consistent with, and even required by, the *Chevron* doctrine.[153] The court stated, "just as we must defer to an agency's reasonable interpretation of an ambiguous statutory term, we must defer to an agency's reasonable interpretation of a statute containing only an ambiguous principle by which to guide its exercise of delegated authority."[154] In other words, the D.C. Court of Appeals extended the *Chevron* doctrine from granting agencies deference under judicial re-

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[146] *See American Trucking*, 175 F.3d at 1034–39; *see also* Oren, *supra* note 128, at 10658.

[147] *See American Trucking*, 175 F.3d at 1034–39.

[148] *See id.* at 1033–34.

[149] *Id.* at 1061 (Tatel, J., dissenting) (citation omitted). *See also Recent Cases*, *supra* note 134, at 1055 (noting that "the *American Trucking* version of the nondelegation doctrine is . . . an inappropriate tool for dealing with agency arbitrariness"); Oren, *supra* note 128, at 10658 (noting that "*American Trucking* can readily be explained as deciding that the Agency was arbitrary and capricious").

[150] *See American Trucking*, 175 F.3d at 1059–61 (Tatel, J., dissenting).

[151] *See American Trucking*, 195 F.3d at 6.

[152] *See id.* at 6–8.

[153] *See id.* at 8.

[154] *Id.*

view,[155] to granting agencies the opportunity to save what would otherwise have been deemed an unconstitutionally broad delegation of legislative power.[156]

In *Whitman v. American Trucking Associations, Inc.*, however, the Supreme Court not only reversed the D.C. Circuit's nondelegation holding,[157] but also sharply criticized the reasoning underlying that holding.[158] Writing for a unanimous Court, Justice Scalia adamantly explained that the D.C. Circuit was mistaken in granting EPA the opportunity to save the delegation by reinterpreting it more narrowly.[159] Only Congress, the Court reasoned, can cure an unconstitutional delegation, because only Congress has the power to delegate such power in the first place.[160] Moreover, the Court noted, only the courts (not Congress or the agency) have the power to determine whether the delegation is constitutional.[161] As such, the Court rejected the D.C. Circuit's new approach to the nondelegation doctrine.

The Court further found that there was no need for Congress to cure the delegation because the criteria "requisite for human health" satisfies the intelligible principle test, and "is in fact well within the outer limits of our nondelegation precedents."[162] As such, the Court in *American Trucking* maintained a lenient application of the intelligi-

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[155] *See id.*

[156] *See American Trucking*, 195 F.3d at 8.

[157] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 914 (2001). The Court summarized the lower court holding in this way: "The court hence found that the EPA's interpretation (but not the statute itself) violated the nondelegation doctrine." *Id.* at 912.

[158] *See id.*

[159] *See id.* Citing the nondelegation (i.e., intelligible principle) test as originally articulated in *J.W. Hampton*, the Court explained that it has

> never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute. . . . The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.

Id.

[160] *See id.*

[161] *See id.* The Court explained, "[w]hether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer." *Id.*

[162] *See American Trucking*, 121 S.Ct. at 913. As examples of previously-upheld delegations that were even broader than the delegation in *American Trucking*, the Court cited: American Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946); Yakus v. United States, 321 U.S. 414, 420 (1944); National Broadcasting Co. v. United States, 319 U.S. 190, 225–26 (1943); New York Central Securities Corp. v. United States, 287 U.S. 12, 24–25 (1932). *Id.*

ble principle test in a manner consistent with the past seventy years of precedent.[163] Notably, the Court was unanimous on this point,[164] marking an apparent departure for Chief Justice Rehnquist, who during the 1980's had twice called for a stricter application of the nondelegation doctrine.[165]

Interestingly, respondents had argued that the "requisite for human health" criteria would fulfill the intelligible principle test only if the Court found that costs must be considered as part of EPA's "human health" analysis.[166] In other words, respondents were willing to concede the delegation issue if the Court would read a cost-benefit analysis into the CAA, arguing that the phrase "requisite for human health" is unconstitutionally vague unless interpreted to require a cost-benefit analysis.[167] Rejecting this argument, the Court explicitly stated that section 109(b) "unambiguously bars cost considerations from the NAAQS-setting process,"[168] particularly when read in the context of the CAA as a whole, and in light of its legislative history.[169] Moreover, the Court implied that a cost-benefit analysis would actually

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[163] *See id.*

[164] *See id.* at 919. Although none of the Justices dissented in this case, Justices Thomas, Stevens, and Breyer offered concurring opinions. *See id.* at 919–24. Justice Thomas agreed that the delegation in this case met the intelligible principle test, but maintained that the intelligible principle test itself may fail to prevent an unconstitutional delegation of legislative authority. *See id.* at 919–20. Justice Stevens (joined by Justice Souter) also agreed with the Court's upholding of the delegation, but would prefer to "admit" that EPA's rulemaking authority is a form of legislative power, rather than simply "pretend, as the Court does, that the authority delegated to the EPA is somehow not 'legislative power'." *Id.* at 920. Lastly, Justice Breyer joined in the Court's nondelegation holding, and concurred with its refusal to read a cost-benefit analysis into the "requisite for human health standard." *See id.* at 921–24.

[165] *See supra* notes 93–105 and accompanying text. The Court itself referenced the Chief Justice's previous calls for invocation of the nondelegation doctrine, explaining that—contrary to respondents' argument in favor of reading a cost-benefit analysis into the CAA—it was the *lack* of a cost-benefit analysis that kept the delegation in *American Trucking* constitutionally intelligble. *See American Trucking*, 121 S.Ct. at 912–13.

[166] *See American Trucking*, 121 S.Ct. at 910–11.

[167] *See id.* Indeed, when pressed during oral argument, respondent conceded the delegation issue, focusing instead on the assertion that the CAA requires EPA to consider costs whem promulgating NAAQS.

[168] *Id.* at 911.

[169] *See id.* In emphasizing the importance of a contextualized reading of section 109(b), the Court explained that, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id.* at 909–10.

serve to make the "requisite for human health" standard *more* vague.[170]

II. "Committed to Agency Discretion"

Chapter 7 of the Administrative Procedure Act (APA) governs judicial review of agency actions,[171] and lays out two instances in which agency actions are excepted from judicial review.[172] First, courts are barred from reviewing agency actions where Congress has explicitly precluded judicial review under the terms of the governing statute.[173] Second, courts are barred from reviewing agency actions that are "committed to agency discretion."[174] Because the Court has found that the APA carries a strong presumption of judicial review,[175] these two exceptions have been construed narrowly.[176] Specifically, the Court announced in 1971[177] that it will find an agency action "committed to agency discretion" only in rare cases where the terms of the governing statute are so broad that there is no meaningful law to guide the court's decision, i.e., there is "no law to apply."[178]

A. Citizens to Preserve Overton Park, Inc. v. Volpe

The Supreme Court first articulated the "no law to apply" test in *Citizens to Preserve Overton Park, Inc. v. Volpe*, where the Secretary of

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[170] *See supra* note 165. At oral argument, Justice Ginsberg made the point succinctly when she reasoned that a cost-benefit requirement would only further confuse (rather than clarify) the NAAQS-setting process, and would simply provide respondents and other EPA opponents with an additional basis for litigation in the future.

[171] For a discussion of the availability of judicial review of agency inaction, *see* Brandon L. Pham, Comment, *The Federal Endangered Species Act: Is Judicial Review Available to Safeguard Against Agency Decisions Not to Enforce?*, 13 UCLA J. Envtl. L. & Pol'y 329 (1994/1995).

[172] *See* Richard J. Pierce et al., Administrative Law and Process 128 (3d ed. 1999).

[173] *See* 5 U.S.C. § 701(a)(1) (providing that judicial review is permitted unless "statutes preclude judicial review").

[174] *See* 5 U.S.C. § 701(a)(2) (providing that judicial review is permitted unless "agency action is committed to agency discretion by law").

[175] *See* Abbott Lab. v. Gardner, 387 U.S. 136, 140 (1967). The Court explained that "[t]he Administrative Procedure Act embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute'." *Id.*

[176] *See* Pierce et al., *supra* note 155, at 132–33.

[177] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). For a pre-*Overton Park* discussion of "committed to agency discretion," see Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 Harv. L. Rev. 367 (1968).

[178] *See Overton Park*, 401 U.S. at 410.

Transportation argued that his decision to build a highway through a city park was not subject to judicial review because it fell into the "committed to agency discretion" exception.[179] Rejecting this argument, the Court held that the Secretary's decision had not been "committed to agency discretion," and therefore did not escape judicial review.[180] Specifically, the Court pointed to the clear statutory language governing the use of public parkland as evidence that the Secretary did not enjoy unfettered discretion over the placement of the highway.[181] Moreover, the Court explained that section 701(a)(2) is "a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply'."[182]

The Court's "no law to apply" reasoning in *Overton Park* met with sharp criticism.[183] Specifically, scholars focused on the possibility that the "no law to apply" test could permit agency abuse of discretion to escape judicial review.[184] Arguing that the Court misunderstood the legislative history on which it based its interpretation of section 107(a)(2), Professor Kenneth Culp Davis rejects the Court's proposition that Congress meant to preclude judicial review of agency actions when there was "no law to apply."[185] Rather, he maintains that the section 107(a)(2) exception was meant only to preclude review of statutory questions, not of an agency's abuse of discretion.[186] Post-*Overton Park* decisions are consistent with the approach advocated by Professor Davis.[187]

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[179] *See id.* at 411.

[180] *See id.* at 413.

[181] *See id.* at 411 (quoting § 4(f) of Department of Transportation Act and § 138 of Federal-Aid Highway Act, which prohibited Secretary from approving "any program or project" involving use of public parkland "unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park").

[182] *See id.* at 410 (quoting legislative history of § 701(a)(2)).

[183] *See* Kenneth Culp Davis, *"No Law to Apply,"* 25 SAN DIEGO L. REV. 1, 1 (1988); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 704–05 (1990).

[184] *See* Davis, *supra* note 183, at 2; Levin, *supra* note 183, at 707.

[185] *See* Davis, *supra* note 166, at 1 (quoting the legislative history, "'[i]f . . . statutes are drawn in such broad terms that in a given case there is no law to apply, courts have no statutory question to review'"). Professor Davis states emphatically: "[t]he committee did not say and did not imply that a court should deny review when it has no law to apply." *Id.*

[186] *See id.* at 2. Professor Davis explains that, "Congress stated quite clearly in the APA that it intended courts to review administrative action for abuse of discretion, and an abuse of discretion may or may not involve law." *Id.*

[187] *See id.*

Professor Ronald M. Levin echoes Professor Davis' observation, and further criticizes the Court's reasoning in *Overton Park* by pointing out "serious flaws in the Court's apparent holding that the applicability of section 701(a)(2) turns solely on whether there is 'law to apply' to the agency decision."[188] The "flaws" include technical errors in which the Court mischaracterize the holding of a previously-decided case, and twice incorrectly described standards of judicial review of agency actions.[189] Most notably, he maintains, by adopting the Senate Judiciary Committee's interpretation of section 701(a)(2), the Court failed to draw a meaningful distinction between whether an agency action is reviewable and whether it is legal.[190] Thus, as articulated in *Overton Park*, the "no law to apply" test rendered section 701(a)(2) superfluous.[191] Professor Levin attributes these problems to the Court's hastiness in handing down the decision.[192]

B. *An Increasingly Broader Application of* Overton Park

In response to such criticisms, and in keeping with lower court decisions,[193] a decade later the Supreme Court began to broaden the *Overton Park* test by declining to exercise judicial review in three cases.[194] In *Heckler v. Chaney*, the Court announced that agency decisions not to act are presumptively unreviewable.[195] In *Heckler*, death row inmates contacted the Food and Drug Administration (FDA) regarding drugs to be used in a newly adopted death penalty procedure.[196] The inmates, arguing that the drugs had not been approved[197] for use in human executions, asked the FDA to investigate their claim and enforce the regulatory requirements. However, the

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[188] Levin, *supra* note 183, at 705.

[189] *See id.* at 705, 705 n.74.

[190] *See id.* at 705–06.

[191] *See id.*

[192] *See id.* at 705 n.73. Professor Levin explains that, "only three months elapsed from the day the Supreme Court granted review until the day when the decision came down." *Id.*

[193] *See generally* Langevin v. Chenago Court, Inc., 447 F.2d 296 (2d Cir. 1971); Hahn v. Gottlieb, 430 F.2d 1243 (1st Cir. 1970).

[194] *See* Dalton v. Specter, 511 U.S. 462, 477 (1994); Webster v. Doe, 486 U.S. 592, 601 (1988); Heckler v. Chaney, 470 U.S. 821, 838 (1985). For an in-depth analysis of *Overton Park*, *Chaney*, and *Webster*, *see generally* Levin, *supra* note 166.

[195] *See Chaney*, 470 U.S. at 837–38.

[196] *See id.* at 823–34.

[197] *See id.* at 824. Under 21 U.S.C. § 355, the FDA is required to approve "new drugs" as "safe and effective" prior to interstate distribution. *See id.*

Commissioner of the FDA declined to act.[198] Relying on the "committed to agency discretion" exception,[199] the Court held that the Commissioner's decision not to act was beyond the scope of judicial review.[200] More importantly, the Court announced that the presumption of reviewability does not extend to agency inaction.[201]

In *Webster v. Doe*, the Court examined the Central Intelligence Agency (CIA) Director's decision to discharge security officer "John Doe" from employment because he was a homosexual.[202] Under section 102(c) of the National Security Act (NSA), the Director of the CIA may terminate employment whenever he determines such an action to be necessary.[203] The Court declined to review the Director's decision under the APA,[204] holding that the action was "committed to agency discretion."[205] The Court reasoned that section 102(c) provided "no meaningful standard against which to judge the agency's exercise of discretion," and thus there was "no law to apply."[206] As one commentator noted, however, the *Webster* decision was not based solely on a "no law to apply" analysis.[207] Rather, the Court weighed more practical considerations, and in reality was reluctant to become involved in matters of national security.[208]

In *Dalton v. Specter*, the Court was asked to review a report created by the Base Closing Commission and approved by the President.[209] The Defense Base Closure and Realignment Act authorized the Commission to recommend military base closings. If the President approved the report and Congress did not formally disapprove it, the recommendations would be implemented.[210] The Act was designed "to provide a fair process that will result in the timely closure and rea-

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198 *See id.* at 823–24.

199 *See id.* at 830–31.

200 *See Chaney*, 470 U.S. at 838.

201 *See id.* at 837–38.

202 *See Webster*, 486 U.S. at 595.

203 *See id.* at 594 (quoting § 102(c) of the National Security Act of 1947, as amended). Section 102(c) provides that, "the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." *Id.*

204 *See id.* at 605. Significantly, however, the Court explained that the "no law to apply" exception does not preclude judicial review of Constitutional claims, but rather only of claims based on the APA. *See id.*

205 *See id.* at 601.

206 *See id.*

207 *See* Levin, *supra* note 183, at 730–31.

208 *See id.*

209 *See* Dalton v. Specter, 511 U.S. 462, 464–65 (1994).

210 *See id.* at 465.

lignment of military installations."[211] Holding that the President's approval of the Commission's report was not subject to judicial review, the Court explicitly rejected the respondents' argument that such a holding "virtually repudiate[d]" *Marbury v. Madison*.[212] Significantly, the Court noted that the respondents had not argued that the Act violated the nondelegation doctrine.[213]

III. It's All or Nothing: The Logical Inconsistency Presented by Nondelegation and "Committed to Agency Discretion"

A. *Standards for Nondelegation and "Committed to Agency Discretion"*

Both nondelegation and "committed to agency discretion" inquiries are triggered by broadly written statutes.[214] When Congress uses vague statutory language to delegate authority, as it often does,[215] the stage is set for plaintiffs to argue that an agency action has violated the nondelegation doctrine,[216] or for the government to defend its action as "committed to agency discretion."[217] For instance, in all post-*Hampton* cases, courts have commenced their nondelegation analyses by referencing a broad grant of delegation,[218] often directly acknowledging it to be the plaintiff's argument.[219] Similarly, the "committed to agency discretion" exception to judicial review rests on the premise that through a broad governing statute Congress has impliedly granted an agency unfettered discretion.[220] As such, the very same starting point—a broadly written statute—simultaneously implicates both doctrines.[221]

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[211] *See id.* at 464 (quoting § 2901(b) of the Defense Base Closure and Realignment Act of 1990).

[212] *See id.* at 477.

[213] *See id.* at 473 n.5.

[214] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. at 912; Webster v. Doe, 470 U.S. 592, 601 (1988).

[215] *See Mistretta*, 488 U.S. at 372.

[216] *See id.*

[217] *See* Levin, *supra* note 183, at 694. Professor Levin describes the "committed to agency discretion" exception as a "threshold defense" such that "[w]hen the government prevails on this defense, a particular administrative action or finding receives no scrutiny—not even deferential scrutiny—on judicial review." *Id.*

[218] *See supra* Section I(B).

[219] *See supra* Section I(B).

[220] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[221] *See Overton Park*, 401 U.S. at 410; Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 611 (1980).

Moreover, courts analyze questions of delegation and "committed to agency discretion" in a strikingly similar fashion.[222] In both instances, the court's task is to determine whether the agency's action was guided by a clear statutory standard.[223] Specifically, a delegation is unconstitutional if the governing statute lacks an intelligible principle,[224] and an agency action is "committed to agency discretion" if the governing statute provides "no law to apply."[225]

In delegation inquiries, the intelligible principle requirement is fulfilled when the governing statute provides an agency with sufficiently clear goals.[226] This requirement has become in many ways an empty one, with courts establishing over time an extremely low threshold for defendants to meet.[227] For example, courts have found that standards such as "fair and equitable"[228] and "to the extent feasible"[229] fulfill the intelligible principle requirement.

Recent criticisms of the Court's increasingly more lenient application of the nondelegation doctrine suggested that the trend might have begun moving toward a stricter or more moderate application.[230] Most notably, in *American Trucking*, the D.C. Circuit held that EPA's interpretation of the standard "to protect public health" with an "adequate margin of safety" was too vague, and thus did not fulfill the intelligible principle test.[231] Any speculation that the nondelegation doctrine might be resurrected was put to rest in February, however, when the Supreme Court reversed the D.C. Circuit's nondelegation holding, reiterating in *American Trucking* its commitment to continue applying the intelligible principle test in a lenient manner, consistent with that of the past seventy years.[232]

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[222] *See Overton Park*, 401 U.S. at 410; J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[223] *See Overton Park*, 401 U.S. at 410; *J.W. Hampton*, 276 U.S. at 409.

[224] *See J.W. Hampton*, 276 U.S. at 409.

[225] *See Overton Park*, 401 U.S. at 410.

[226] *See* Yakus v. United States, 321 U.S. 414, 427 (1944).

[227] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989).

[228] *See Yakus*, 321 U.S. at 427.

[229] *See* Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 611 (1980).

[230] *See American Textile*, 452 U.S. at 547–48 (Rehnquist, J., dissenting); *Industrial Union*, 448 U.S. at 686 (Rehnquist, J., concurring); Schoenbrod, *supra* note 19, at 732.

[231] *See* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *opinion modified on reh'g*, American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd sub nom.* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903 (2001).

[232] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 914 (2001).

The "no law to apply" test, on the other hand, is met when the language of the governing statute is sufficiently unclear, such that no meaningful standard can be discerned.[233] Thus, by failing to provide "law" in the form of clear statutory language, Congress impliedly commits an action to agency discretion.[234] Stated a different way, when Congress fails to provide "law,"[235] by definition it fails to provide an "intelligible principle."[236]

The Court initially established the "no law to apply" test as an extremely difficult one to meet, explaining that the exception would apply only in "rare cases."[237] In *Overton Park*, the Secretary's decision to build a highway through a park did not escape judicial review because the statutory language "feasible and prudent" was sufficiently clear to constitute "law to apply."[238] It would be fair to say, additionally, that the statutory standard "feasible and prudent" constituted an intelligible principle that served to cabin the Secretary's discretion.[239]

The "no law to apply" standard has become somewhat less stringent.[240] In several cases, the Court has found that Congress used sufficiently broad statutory language to warrant application of the "committed to agency discretion" exception.[241] Significantly, though, in none of these cases did the Court rely solely on the "no law to apply" test.[242] Instead, the Court explicitly[243] or implicitly[244] considered other factors in its analyses. Thus, while the "no law to apply" test has become somewhat easier to meet, it remains a relatively narrow exception that applies only in "rare cases."[245]

B. *Sources of Intelligible Principles and "Law to Apply"*

Traditionally, courts have resolved both nondelegation[246] and "committed to agency discretion"[247] inquiries by looking to the lan-

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[233] *See* Webster v. Doe, 486 U.S. 592, 600 (1988).

[234] *See id.*

[235] *See id.*

[236] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[237] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[238] *See id.* at 413.

[239] *See J.W. Hampton*, 276 U.S. at 409.

[240] *See Webster*, 486 U.S. at 601.

[241] *See* Dalton v. Specter, 511 U.S. 462, 477 (1994); *Webster*, 486 U.S. at 601; Heckler v. Chaney, 470 U.S. 821, 838 (1985).

[242] *See Dalton*, 511 U.S. at 469; *Webster*, 486 U.S. at 600; *Chaney*, 470 U.S. at 831.

[243] *See Dalton*, 511 U.S. at 469.

[244] *See Webster*, 486 U.S. at 600; *Chaney*, 470 U.S. at 831.

[245] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[246] *See Schechter Poultry*, 295 U.S. at 530.

[247] *See Overton Park*, 401 U.S. at 411.

guage of the governing statute. Specifically, courts have examined the relevant statutory language to determine whether an intelligible principle[248] or "law to apply"[249] can be discerned. The statute serves as the analytical focal point because it is, of course, the tool through which Congress delegates.[250] Moreover, the manner in which Congress delegated is, in theory, precisely the issue at the center of nondelegation[251] and "committed to agency discretion"[252] cases.

Courts often look beyond the specific statutory provision when deciding whether Congress provided an intelligible principle[253] or "law to apply."[254] Not surprisingly, courts will read the relevant statutory phrase or phrases within either the context of the statute as a whole[255] or the statute's legislative history.[256] However, because the emphasis remained focused on Congress as the delegator, this development was a relatively minor one.[257]

In a much more dramatic shift, courts began to look beyond Congress (the delegator) to the agency (the delegatee).[258] That is, both doctrines have evolved such that lower courts recently have begun to allow the agency itself to provide the intelligible principle[259] or "law to apply."[260] Although the Supreme Court made clear in *American Trucking* that such a shift is inappropriate in the context of a nondelegation analysis,[261] thus far it has made no such finding in the context of a "committed to agency discretion" analysis. The same policy considerations that make such a shift inappropriate in the delegation

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[248] *See Schechter Poultry*, 295 U.S. at 530.

[249] *See Overton Park*, 401 U.S. at 411.

[250] *See* BREYER ET AL., *supra* note 49, at 35.

[251] *See* Mistretta v. United States, 488 U.S. 361, 374 (1989). The nondelegation doctrine requires that Congress provide a clear guiding principle when delegating. *See id.*

[252] *See Overton Park*, 401 U.S. at 410. The "committed to agency discretion" exception requires that Congress delegate through extremely broad and vague statutory language. *See id.*

[253] *See Mistretta*, 448 U.S. at 376 n.10.

[254] *See* Webster v. Doe, 486 U.S. 592, 600–01 (1988).

[255] *See id.*

[256] *See Mistretta*, 448 U.S. at 376 n.10.

[257] *See id.*

[258] *See* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *opinion modified on reh'g*, American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd sub nom.* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903 (2001).

[259] *See id.*

[260] *See supra* section II(B). This creates a tension, of course, because the agency would not want the court to find "law to apply." Thus, it is ironic that the agency's own policy statements can be used to defeat the "committed to agency discretion" defense.

[261] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 912–14 (2001).

context,[262] however, are equally as applicable in the "committed to agency discretion" context.[263]

C. *Intelligible Principles, "Law to Apply," and Judicial Review*

It is clear that the intelligible principle requirement[264] and the "no law to apply" test[265] exist in theory[266] as tools by which courts determine the nature of a congressional delegation. Specifically, with nondelegation inquiries, courts ask whether Congress gave away its legislative power;[267] with "no law to apply" inquiries, courts ask whether Congress impliedly committed a particular action to an agency's discretion.[268] However, it is also true that both tests fulfill another important purpose as well. Both the nondelegation doctrine[269] and the "no law to apply" exception[270] guarantee that courts will either have a workable standard by which to conduct judicial review, or in the absence of such a standard, will have a legal basis on which to deny review of the agency action.

Although nondelegation was developed as a separation of powers doctrine to safeguard against Congressional "buck passing" and unfettered agency discretion,[271] it has also served a more practical purpose for courts.[272] When Congress fails to articulate with sufficient clarity its substantive goals or procedural guidelines, a court has no real basis by which to assess an agency's actions.[273] In other words, the intelligible principle requirement ensures that courts will have a standard by which to review agency actions.[274]

In *Yakus*, the Court explicitly acknowledged the connection between the nondelegation doctrine and judicial review.[275] There, the Court explained that invocation of the nondelegation doctrine would be justified "[o]nly if we could say that there is an absence of stan-

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[262] *See id.* at 912; J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[263] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[264] *See J.W. Hampton*, 276 U.S. at 409.

[265] *See Overton Park*, 401 U.S. at 410.

[266] *See infra* notes 267–72 and accompanying text.

[267] *See J.W. Hampton*, 276 U.S. at 409.

[268] *See Overton Park*, 401 U.S. at 410.

[269] *See* Yakus v. United States, 321 U.S. 414, 426 (1944).

[270] *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[271] *See* Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935); *J.W. Hampton*, 276 U.S. at 409.

[272] *See Yakus*, 321 U.S. at 426.

[273] *See id.*

[274] *See id.*

[275] *See id.*

dards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed."[276] Unlike its traditional nondelegation reasoning, which focused on the need for Congress to guide an agency's decision making,[277] the Court's reasoning in this passage emphasizes its own more practical need for Congress' guidance.[278] That is, by providing an intelligible principle, Congress not only limits the scope of an agency's discretion to within constitutional bounds,[279] but also establishes a standard by which the Court can review the agency's actions as well.[280]

The Court has connected judicial review even more readily and overtly to the "no law to apply" test[281] than it has to the nondelegation doctrine.[282] In *Heckler*, the Court explained that an agency action is "committed to agency discretion" where the governing statute is so broadly written that, "a court would have no meaningful standard against which to judge the agency's exercise of discretion."[283] Indeed, even the very name of the test implies that the exception will apply when there is "no law" for the court "to apply."[284]

D. *The False Dilemma*

Strictly speaking, the "no law to apply" exception precludes judicial review in cases where Congress has provided extremely vague and unclear statutory language.[285] As such, Professor Levin worries that application of the pure "no law to apply" test as articulated in *Overton Park* will leave agency action unreviewable in the very situation in which judicial review is most needed.[286] He writes:

> [c]onsider a case in which the relevant statutes have granted the agency sweeping discretion, but the challenger claims

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[276] *Id.*

[277] *See Panama Refining*, 293 U.S. at 421.

[278] *See Yakus*, 321 U.S. at 426.

[279] *See J.W. Hampton*, 276 U.S. at 409.

[280] *See Yakus*, 321 U.S. at 426.

[281] *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985).

[282] *See infra* notes 283–86 and accompanying text.

[283] *See Chaney*, 470 U.S. at 830. *But see* Levin, *supra* note 166, at 693 (arguing that the Court has "overemphasized" the judicial review aspect of its "no law to apply" reasoning). Professor Levin maintains that, "judicial review is virtually always feasible, and that the real question is one of desirability." *Id.*

[284] *See Chaney*, 470 U.S. at 830.

[285] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[286] *See* Levin, *supra* note 166, at 707.

> the agency has exercised its discretion improperly. The challenger probably would assert this claim under section 706(2)(A) of the APA, which states that an agency action shall be set aside if found to be "arbitrary, capricious, [or] an abuse of discretion." Under *Overton Park*, this type of scrutiny—known as arbitrariness review or abuse of discretion review—is simply unavailable if there is no "law to apply."[287]

In other words, the "no law to apply" test allows agencies to escape judicial review precisely in cases where they already enjoy an extraordinary amount of discretion due to the vagueness of the governing statute.[288]

While Professor Levin's concern is a compelling one, upon closer examination it proves to be unfounded. The "no law to apply" exception notwithstanding,[289] there remains available an important check against agency arbitrariness.[290] That check is, of course, the nondelegation doctrine.[291] Because the "committed to agency discretion" exception is a statutory one provided by the APA, the Court has found that it precludes judicial review only of claims made under the APA.[292] More to the point, the exception does not preclude constitutional claims;[293] thus, it does not preclude a nondelegation claim.[294]

The nondelegation doctrine allows plaintiffs an indirect means by which to challenge an agency action, because a nondelegation violation negates an agency's power to act in the first place.[295] In other words, although the "no law to apply" exception precludes substantive review of an agency action,[296] a court can nonetheless overturn that action by invoking the nondelegation doctrine in cases where Congress had granted the agency too much discretion.[297] Indeed, because the standards for an intelligible principle and "law to apply" are essen-

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[287] *Id.*

[288] *See id.*

[289] *See Overton Park*, 401 U.S. at 410.

[290] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 914 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

[291] *See J.W. Hampton*, 276 U.S. at 409; *American Trucking*, 121 S.Ct. at 914.

[292] *See* Webster v. Doe, 486 U.S. 592, 605 (1988).

[293] *See id.*

[294] *See J.W. Hampton*, 276 U.S. at 409.

[295] *See American Trucking*, 121 S.Ct. at 912.

[296] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

[297] *See American Trucking*, 121 S.Ct. at 914.

tially the same,[298] the nondelegation argument becomes particularly compelling in cases where the court finds there is "no law to apply."[299]

Of course, the nondelegation doctrine is only as meaningful a check as the courts allow it to be.[300] During the past seventy years, the courts have loosened the intelligible principle requirement to the point that it is almost meaningless, rarely finding that a statutory provision in fact lacks an intelligible principle.[301] Thus, to the extent that the nondelegation doctrine is "moribund,"[302] Professor Levin's concern may indeed prove to be well-founded after all.[303] If the intelligible principle requirement were applied more strictly and with greater consistency, however, it would serve as a meaningful and reliable check in cases where judicial review is precluded under the APA.[304]

E. *The Real Dilemma*

Although the dilemma articulated by Professor Levin can be resolved on one level,[305] a different, more fundamental problem looms within the resolution itself. While it is true that nondelegation can serve as a check against the seemingly unfettered authority granted an agency through the "committed to agency discretion" exception,[306] bringing the two doctrines together in this way reveals the contradiction they embody. While one doctrine significantly expands agency discretion by precluding judicial review of actions governed by extremely broad delegations,[307] the other mandates that such broad delegations be declared unconstitutional, thus nullifying the agency's authority to act in the first place.[308]

Such a contradiction becomes even more profound in light of the fact that both nondelegation and "committed to agency discretion" inquiries are not only triggered by broadly written statutes, but

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[298] *See supra* Section III(A).

[299] *See infra* Section III(E).

[300] *See* Mistretta v. United States, 488 U.S. 361, 371 (1989); Schoenbrod, *supra* note 19, at 732.

[301] *See* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 913–14 (2001); *Mistretta*, 488 U.S. at 372. The Supreme Court has not struck down a delegation as unconstitutional since 1936. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

[302] *See* National Cable Television Ass'n, Inc. v. United States, 415 U.S. 352, 353 (1974); *see also American Trucking*, 121 S.Ct. at 912–14.

[303] *See* Levin, *supra* note 166, at 707.

[304] *See Panama Refining*, 293 U.S. at 421.

[305] *See supra* Section III(D).

[306] *See id.*

[307] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 409 (1971).

[308] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

are also analyzed under strikingly similar tests.[309] As we have seen, a statute violates the nondelegation doctrine if it lacks an intelligible principle,[310] and qualifies for the "committed to agency discretion" exception if it lacks "law to apply."[311] The Court's goal under both tests is to determine the scope of the Congressional delegation.[312] More specifically, when a court determines that a governing statute lacks either an intelligible principle or "law to apply," it is determining that Congress has granted the agency an exceedingly large amount of discretion.[313]

Moreover, the standards for meeting both the intelligible principle and "law to apply" tests are quite easily met.[314] Although the court gave teeth to the intelligible principle requirement for a short period in the mid-1930s,[315] since that time the standard has become increasingly more relaxed as courts have upheld extremely vague delegations.[316] The "law to apply" test is a similarly easy one to meet, with the Supreme Court stating from the outset that most statutes do in fact provide "law to apply," and that the "committed to agency discretion" exception would apply only in "rare instances."[317] Despite the slight loosening of the "no law to apply" standard in recent cases, the test remains a difficult one to meet.[318] The fact is, courts rarely find that a statute lacks an intelligible principle[319] or "law to apply,"[320] perhaps because either finding would dictate a rather extreme result.

In the end, the nondelegation and "committed to agency discretion" tests are essentially the same[321] and generally lead to noncontradictory results. That is, in most cases the intelligible principle requirement[322] or "law to apply" test[323] is met, and thus the delegation is constitutional, or the subsequent agency action reviewable. The problem arises, however, in those rare cases in which a court finds that a

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[309] *See supra* Section III(A).
[310] *See J.W. Hampton*, 276 U.S. at 409.
[311] *See Overton Park*, 401 U.S. at 410.
[312] *See Overton Park*, 401 U.S. at 410; *J.W. Hampton*, 276 U.S. at 409.
[313] *See supra* Section III(A).
[314] *See id.*
[315] *See supra* Section I(B).
[316] *See supra* Section I(C).
[317] *See Overton Park*, 401 U.S. at 410 (quoting legislative history of § 701(a)(2)).
[318] *See supra* Section II(B).
[319] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989).
[320] *See Overton Park*, 401 U.S. at 410.
[321] *See supra* Section III(A).
[322] *See Mistretta*, 488 U.S. at 372.
[323] *See Overton Park*, 401 U.S. at 410.

delegation does lack an intelligible principle[324] or "law to apply."[325] Analytically, it appears that a delegation that fails to meet one test should fail to meet the other as well. When a court finds that a delegation lacks an intelligible principle, it follows that the delegation also lacks "law to apply," and vice versa. No court has ever made such a finding, however, or even reasoned through the issue on the record. Though it seems difficult to imagine, perhaps no court has ever had occasion or opportunity to analyze both doctrines within a single case.[326]

Even more problematic, however, is the logical inconsistency presented by the fact that the two doctrines, which are informed by seemingly identical tests,[327] demand wildly diverging results. Under the nondelegation doctrine, an extremely broad delegation results in the nullification of the delegation itself, thus revoking the agency's authority to act.[328] Stated differently, a finding that a delegation lacks an intelligible principle results in the agency's complete loss of ability to exercise discretion.[329] The "committed to agency discretion" exception, on the other hand, dictates an entirely opposite outcome.[330] Rather than resulting in the termination of agency discretion, a finding of "no law to apply" results in a discretionary windfall for the agency, shielding its actions from judicial review under the APA.[331]

Of course, the "committed to agency discretion" exception does not shield the agency from all forms of judicial review.[332] Specifically, it does not shield the agency from review of constitutional claims,[333] including nondelegation claims. Does it not follow, then, that if a court finds that a governing statute provides "no law to apply"[334] it must also find that the statute lacks an intelligible principle, and thus

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[324] *See* American Trucking Ass'ns, Inc. v. EPA, 175 F.3d 1027, 1034 (D.C. Cir. 1999), *opinion modified on reh'g*, American Trucking Ass'ns, Inc. v. EPA, 195 F.3d 4 (D.C. Cir. 1999) (per curiam), *rev'd sub nom.* Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903 (2001).

[325] *See* Dalton v. Specter, 511 U.S. 462, 473 (1994).

[326] *See id.* at 473 n.5 (noting that respondents had not raised nondelegation argument).

[327] *See supra* Section III(A).

[328] *See Panama Refining*, 293 U.S. at 430; Whitman v. American Trucking Ass'ns, Inc., 121 S.Ct. 903, 912 (2001).

[329] *See Panama Refining*, 293 U.S. at 430; *American Trucking*, 121 S.Ct. at 912.

[330] *See Dalton*, 511 U.S. at 473.

[331] *See id.*

[332] *See* Webster v. Doe, 486 U.S. 592, 605 (1988).

[333] *See id.*

[334] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

violates the nondelegation doctrine?[335] Do not the terms of the two doctrines dictate that what a court gives with one hand[336] it must take away with the other?[337]

I propose that the real dilemma is this: the "committed to agency discretion" exception, as applied under the standards of the "no law to apply" test, is unconstitutional. By its own definition, the "committed to agency discretion" exception violates the nondelegation doctrine.[338] If a court finds that a delegation lacks "law to apply,"[339] it follows analytically that not only *can* the court find that the delegation lacks an intelligible principle, but that it *must* do so.

CONCLUSION

Given the current trend toward an ever-expanding administrative state, and given the Court's unanimous rejection of the delegation argument in *American Trucking*, it seems likely that the nondelegation doctrine will continue to exist in name only, and that the intelligible principle test will grow increasingly more empty over time. Between the two extremes of dogmatic adherence and blithe indifference to the text of the Constitution lies a reasonable and legal resolution. In the interest of facilitating congressional business, the Court should continue to uphold broad delegations as it has for the past seventy years. The Court should, however, draw the line at the "committed to agency discretion" exception by recognizing that any administrative rule promulgated under the authority of a statute that lacks "law to apply" has been promulgated outside the bounds of the nondelegation doctrine, because when a statute lacks "law to apply," it lacks an intelligible principle as well. Moreover, because delegation is a constitutional (rather than administrative) issue, it remains within a court's authority to review the legality of the delegation even where judicial

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[335] *See supra* Section III(A).

[336] *See Dalton*, 511 U.S. at 473.

[337] *See Panama Refining*, 293 U.S. at 421; *American Trucking*, 121 S.Ct. at 912.

[338] *See* Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 682 n.105 (1988). Professor Dripps' article focuses mainly on the implications of his proposition that procedural due process cases are governed by the nondelegation doctrine. *See id.* at 659. In a footnote, however, he links nondelegation with the "committed to agency discretion" exception to judicial review under the APA. *See id.* at 682 n.105. More specifically, Professor Dripps suggests: "If my [due process] thesis is correct, the nondelegation doctrine makes it unconstitutional for Congress to commit the exercise of legislative power entirely to agency discretion." *Id.*

[339] *See Overton Park*, 401 U.S. at 410.

review of the agency action is precluded by the "committed to agency discretion" exception.

While it is true that delegation has become an indispensable tool of the legislature, and that a sudden return to enforcement of the 1935 version of the nondelegation doctrine would paralyze Congress, it remains equally true that ours is (or purports to be) a government of representative democracy. When Congress relinquishes its legislative authority to administrative agencies, and the Supreme Court permits it to do so, the legitimacy of our democracy is compromised. Such a compromise is arguably necessary in light of the volume of issues to which Congress must attend, as well as the extremely complex and technical nature of those issues. To be sure, the regulatory process is greatly benefited by the attention of expert administrators. Such a compromise is, nonetheless, troubling.

Particularly troubling is the "committed to agency discretion" exception, which not only permits Congress to relinquish its legislative authority *entirely*, but in fact rewards agencies with unfettered discretion in such cases by shielding their actions from judicial review. Of course, to date the Court has found very few agency actions to be "committed to agency discretion," and even in those cases extenuating circumstances most likely account for the result. Moreover, each of these cases involved administrative adjudication rather than rulemaking, which suggests perhaps that courts are more willing to allow an agency unfettered adjudicatory power, as opposed to unfettered rulemaking power.

The possibility remains, however, that a court could find that an agency's rulemaking action is shielded from judicial review because the governing statute provides "no law to apply." Application of the 701(a)(2) exception in this way would result in a fundamental breakdown of the democratic process by allowing unelected administrative officials to promulgate rules free of congressional standards and of even the most deferential level of judicial review. In other words, applying the "committed to agency discretion" exception to rulemaking would allow Congress to escape accountability and allow agencies to proceed unchecked, thus leaving the American public without recourse or remedy. Such a result would not only violate the basic tenets of our Constitution, but would defy even the most rudimentary notion of democracy.